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November 17, 2021

VIA ELECTRONIC FILING
The Honorable Jocelyn G. Boyd
Chief Clerk & Executive Director
Public Service Commission of SC
101 Executive Center Dr., Suite 100
Columbia, SC 29210

Re: Generic Docket to Study and Review Prefiled Rebuttal and Surrebuttal Testimony in Hearings and Related Matters
Docket 2021-291-A

Dear Ms. Boyd:

Dominion Energy South Carolina, Inc. ("DESC") files this comment letter in response to Order No. 2021-736 (the "Order") of the Public Service Commission of South Carolina (the "Commission") filed in this docket on November 3, 2021. The Order requested comments from interested parties regarding prefiled rebuttal and surrebuttal testimony.

Based on a review of the Order and the discussion of the matter at the Commission's business meeting on November 3, 2021, DESC believes that the Commission's concerns focus on three issues:

1. Should prefiled rebuttal and surrebuttal testimony continue to be allowed?

2. Should parties be required, in the ordinary course of practice before the Commission, to present a witness's rebuttal or surrebuttal testimony immediately following the witness's direct testimony or can that testimony be held back and presented following the testimony to which the witness is responding?

3. Should the Commission alter the current procedure, substantive requirements, and timelines for pre-filed testimony and exhibits?

As to Question One, DESC opposes any limitation to the rights that currently exists for parties to prefile rebuttal testimony or to prefile surrebuttal or sur-surrebuttal testimony as authorized by the Commission on a case-by-case basis. To do otherwise would deny DESC and other parties their constitutionally protected due process rights to notice of the claims being made by other parties and a practical opportunity to be heard in opposition to them.[1]

In a typical regulatory proceeding, a utility files an application, or petition (the "Application").[2] A rate Application, for example, includes a comprehensive set of the utility's financial statements accompanied by rate base calculations, calculations of capital structure, earned return and cost of debt calculations, a statement of a fair rate of return on equity, and specific pro forma adjustments proposed to be made to the utility's financial results. *See* S.C. Code Ann. Regs. 103-823 (2012).

Thereafter the utility then files direct testimony which must provide evidentiary support for each of the items in the Application. At that point, the utility has presented a prima facie case establishing its entitlement to relief. *Kiawah Prop. Owners Grp. v. The Pub. Serv. Comm'n of S.C.*, 357 S.C. 232, 237, 593 S.E.2d 148, 151 (2004) (the utility is entitled to a presumption that its expenses are reasonable and were incurred in good faith). This presumption "shifts the burden of production on to the . . . contesting party to demonstrate a tenable basis for raising the specter of imprudence." *Hamm v. S.C. Public Service Commission*, 309 S.C. 282, 286, 422 S.E.2d 110, 112 (1992). Nevertheless, "if an investigation initiated by ORS or by the PSC yields evidence that overcomes the presumption of reasonableness, a utility must further substantiate its claimed expenditures." *Utils. Servs. Of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 110, 708 S.E.2d 755, 762–63 (2011).

Similarly, in an Integrated Resource Plan ("IRP") proceeding, the utility presents its draft IRP report and direct testimony supporting the modeling conducted, the inputs to the models and the results calculated. In most other matters, the utility makes a similar showing through its Application and/or direct testimony.

In sum, the Application along with the supporting exhibits and prefiled direct testimony provide the evidence needed to support the applicant's or petitioner's requested relief. The obligation then shifts to ORS and the intervenors (the "Responding Parties") to identify what specific requests or evidence they will challenge and what regulatory or statutory provisions they will assert. *See Hamm*, 309 S.C. at 286, 422 S.E.2d at 112. If appropriate to the proceeding, they

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[1] *See* S.C. Const. art. I, § 22 ("[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard"); S.C. Code Ann. § 1-23-320(E) ("[o]pportunity must be afforded all parties to respond and present evidence and argument on all issues involved"); *Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("[t]he fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review."); *see also* S.C. Code Ann. § 58-3-225 ("[h]earings conducted before the commission must be conducted under dignified and orderly procedures designed to protect the rights of all parties").

[2] *See* S.C. Code Ann. Regs. 103-823 (Applications); S.C. Code Ann. Regs. 103-825 (Petitions); S.C. Code Ann. Regs. 103-842 (Order of Procedure); S.C. Code Ann. Regs. 103-845 (Witnesses); S.C. Code Ann. Regs. 103-848 (Exhibits).

can also raise entirely new issues or contentions. The Responding Parties disclose the case they intend to make only when they file their direct testimony.

The point is that the applicant or petitioner does not know with certainty what contentions will be raised by other parties or what facts, costs or calculations will be challenged until the Responding Parties file their direct testimony. For that reason, the applicant or petitioner cannot adequately respond to those contentions until it files is rebuttal testimony. As Commissioner Caston noted, "the rebuttal testimony may contain more substance and evidentiary support [for the application or petition] than the direct testimony . . .." Commission Business Meeting of November 3, 2021. That is not surprising since rebuttal testimony is the first opportunity that the process gives the applicant or petitioner to respond to the precise issues that are in dispute. Rebuttal testimony is critical in framing and supporting the issues before the Commission.

The suggestion has been made that the role of rebuttal or surrebuttal testimony could be taken by cross examination and "have [that responsive] testimony come out on cross-examination." Commission Business Meeting of November 3, 2021. Of course, the applicant or petitioner cannot cross examine its own witness. So for the applicant or petitioner to have an opportunity to respond to the issues raised by the Responding Parties in their direct testimony, the regulations would have to allow the applicant or petitioner to conduct supplemental direct examination into any relevant issue, and present new witnesses, facts, documents, studies and reports at the time of hearing. In such a process, other parties would have little if any ability to respond effectively to the matters being raised on supplemental direct examination since the time for discovery and case preparation would be long past. In short, eliminating prefiled rebuttal testimony is inconsistent with due process.

Surrebuttal testimony, and in some cases, sur-surrebuttal testimony, is a discretionary right granted on a case-by-case basis by the Commission. *Palmetto Alliance Inc v. South Carolina Public Service Commission*, 282 S.C. 430, 319 S.E. 2d 695 (1984). Such testimony is properly limited to strictly replying to issues raised for the first time in rebuttal or surrebuttal. *State v. Watson*, 353 S.C. 620, 623–24, 579 S.E.2d 148, 150 (Ct. App. 2003) (quoting 88 C.J.S. Trial § 197 (2001)). Enforcing this limitation is important to preventing an endless cycle where "[e] very body wants the last word," as Commissioner Caston observed, and preventing "trial by ambush," where parties raise issues so late in the process that their opponents cannot respond. *See* Commission Business Meeting of November 3, 2021. Similarly, except in extraordinary cases, it is important that procedural schedules not allow the filing of such testimony within four days of hearing. S.C. Code Ann. Regs. 103-845(C) ("[i]n proceedings involving utilities, the Commission shall require any party and the Office of Regulatory Staff to file copies of testimony and exhibits . . . within a specified time in advance of the hearing."). Requiring testimony to be filed at reasonable time before hearing allows parties and opportunity to prepare a response through cross examination or motion to strike.

As to Question Two, DESC has no objection in the ordinary course of practice before the Commission to present both the direct and any rebuttal or surrebuttal testimony of witnesses in one sitting. That has been DESC's regular practice and DESC has no objection to it.

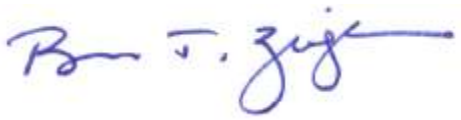
As to Question Three, DESC also has no objection to the current procedure, substantive requirements, and timelines for testimony and exhibits.[3] However, subject to the foregoing, DESC strongly opposes any attempt to limits on its due process rights including, but not limited to, its opportunity to conduct cross examination and redirect or to shorten the time for filing rebuttal testimony. Any attempt to do so would be inconsistent with the parties' legal rights and would lead to time wasted on procedural matters. Moreover, any change sought to the Commission's existing procedures involving the prefiling of testimony would require that the Commission initiate a formal, rulemaking proceeding.

In sum, pre-filed rebuttal and surrebuttal testimony, when used properly, safeguard the parties' due process rights and prevent unfair surprise. As such, DESC opposes any new limitation on rebuttal or surrebuttal testimony.

DESC sincerely appreciates the opportunity to comment and provide input in this matter. Thank you for the time and consideration given this important matter by the Commission.

Respectfully submitted,

Womble Bond Dickinson (US) LLP



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cc: All parties of record (via email)

[3] *See* S.C. Code Ann. Regs. 103-823 (Applications); S.C. Code Ann. Regs. 103-825 (petitions); S.C. Code Ann. Regs. 103-842 (order of procedure); S.C. Code Ann. Regs. 103-845 (witnesses); S.C. Code Ann. Regs. 103-848 (exhibits).